No:

Supreme Court, U.S.
FILED

10-228 JUN 1 - 2010

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ALEJANDRO GODINEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

I. Under the Sixth Amendment to the United States Constitution, does harm need to be shown from the absence of counsel at sentencing?

II. Does a defendant need to be present at sentencing?

INTRODUCTION

After Alejandro Godinez was sentenced to 360 months in prison, the trial court excused him and his counsel from the courtroom and the hearing adjourned. At that point the writer of the presentence investigation report called an error in the guideline calculation to the trial court's attention. Outside the presence of Godinez and his counsel, a discussion was had involving the amount of drugs seized, the type of drugs Godinez was held accountable for, and the previously un-litigated issue of the use of unseized drugs/relevant conduct in determining the proper base offense level. A miscalculation of four levels lower than that used by the trial court became an issue. Being absent from those discussions, Godinez nor his counsel were unable to lodge objections nor explore the context of the trial courts statements and reasoning.

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I. This case presents the rare situation where a United States Court of Appeals has sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power in that the Fifth Circuit Court of Appeals requires a showing of harm from the absence of counsel at sentencing. 4

II. This case presents the rare situation where a United States Court of Appeals has sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power in that the Fifth Circuit Court of appeals requires a defendant to object to proceedings he is unaware of and a showing of harm from his absence during sentencing. 12

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OPINIONS BELOW

On February 2, 2010, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction and sentence in this case. *United States v. Alejandro Godinez*, No. 09-40567 (5th Cir. February 2010) (unpublished). (Appendix A). A copy of the order denying Godinez' Petition for Panel Rehearing is attached as Appendix B. A copy of the judgment and sentence of the district court is attached as Appendix C. The district court did not issue a written opinion.

JURISDICTION

On February 2, 2010, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction and sentence in this case. On March 3, 2010, the United States Court of Appeals for the Fifth Circuit denied Godinez' Petition for Rehearing. Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.
>
> U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the

> jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. Const. amend. XIV.

Federal Rule of Criminal Procedure provides, in relevant part, that the defendant must be present at sentencing. Fed. R. Crim.Pro. 43(a)(3).

STATEMENT OF THE CASE

Course of Proceedings

Petitioner, Alejandro Godinez, is currently incarcerated. Godinez was named in a six count indictment. Specifically, he was indicted in count one of conspiring to possess with intent to distribute more than 5 kilograms of cocaine, more than 1,000 kilograms of marijuana, and more than 500 grams of methamphetamine; in count two of possession with intent to distribute more than 5 kilograms of cocaine, that is, approximately 24 kilograms of cocaine; in count three of possession with intent to distribute more than 500 grams, that is, 6,743 grams of methamphetamine; and in counts four, five, and six of money laundering all in violation of Title 21, United States Code, Sections 846, 848, 841(a)(1), 841(b)(1)(A), and 841(b)(1)(B), 952(a), 960(a)(1) and (b)(1), and 963; Title 18, United States Code Sections 1956(a)(1)(A)(i) and (h).

On February 1, 2008 Godinez pled guilty to counts one and four of the indictment.

On May 15, 2009, Judge Randy Crane sentenced

Godinez to 360 months of confinement with a 5 year term of supervised release as to count one of the indictment to run concurrently with 240 months of confinement with a 3 year term of supervised release as to count four of the indictment. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure on May 22, 2009.

On February 2, 2010, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction and sentence in this case. On March 3, 2010, the United States Court of Appeals for the Fifth Circuit denied Godinez' Petition for Rehearing.

Statement of Facts

As to count one of the indictment, the PSI report notes that a total of 42.412 kilograms of marijuana was seized; 22 kilograms on 9/20/03 and 20.412 kilograms on 10/01/03. (Revised PSI, 1-30-09, p. 8)[1]

The PSI report notes that a vehicle search at a port of entry revealed 22 kilograms of marijuana; that Godinez had allegedly recruited the driver; that a check point search of a vehicle revealed 20.412 kilograms of marijuana; and that a subsequent investigation into this case revealed that the occupants had been recruited by Jose Santacruz on behalf of Godinez to transport the load vehicle. (Revised PSI. 1-30-09, p. 12)

The PSI report also notes that a total of 41.84 kilograms of cocaine was seized; 17.62 kilograms on 6/14/03 and 24.22 kilograms on 10/09/03. (Revised PSI, 1-30-09, p. 8)

The PSI report notes that at a search of vehicle at a port of entry reveled 17.62 kilograms of cocaine; that Godinez had allegedly gave the driver the load vehicle; and that the driver incorrectly identified a person in the line-up

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[1] Citation to the record documents will be made by title, date, and page number Citation to the record transcript will be by date of proceeding followed by page number.

as Godinez; that another vehicle search at a port of entry resulted in the discovery of 24.22 kilograms of cocaine; that a subsequent investigation revealed that the driver had been recruited by Manuel Gonzalez to transport this load vehicle; and that the load vehicle had been retrieved from a residence in Reynosa, Tamaulipas, Mexico, by the driver and Mr. Gonzalez where they had met with Alejandro Godinez. (Revised PSI, 1-30-09, pp. 11.12-13)

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This is a prosecution brought by the United States alleging a violation of Section Title 21, United States Code, Sections 848, 841(a)(1) and 841(b)(1)(A). The district court therefore had jurisdiction pursuant to 18 U.S.C. § 3231

QUESTION PRESENTED FOR REVIEW

Does harm need to be shown from the absence of counsel at sentencing?

REASONS FOR GRANTING THE WRIT

I This case presents the rare situation where a United States Court of Appeals has sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power in that the Fifth Circuit Court of Appeals requires a showing of harm from the absence of counsel at sentencing.

This Court has "found structural error only in a very limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). These structural errors include: total deprivation of the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

This Court long has recognized the "Sixth Amendment's guarantee of counsel" as "'fundamental and essential to a fair trial' " and therefore "made obligatory upon the States by the Fourteenth Amendment." *Id.*, at 342, 83 S.Ct., at 795; see also *Johnson v. Zerbst*, 304 U.S. 458, 462, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938) (the assistance of counsel "is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty"); *Grosjean v. American Press Co.*, 297 U.S. 233, 243-244, 56 S.Ct. 444, 446, 80 L.Ed. 660 (1936) ("the fundamental right of the accused to the aid of counsel in a criminal prosecution" is "safeguarded against state action by the due process of law clause of the Fourteenth Amendment"); *Mempa v. Rhay*, 389 U.S. 128, 137, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967) (due process right to counsel at sentencing); U.S. Const. Amend. XIV.

In *United States v. Chronic*, 466 U.S. 648, 659 & n. 25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the Supreme Court added to the list the denial of counsel at a "critical stage" of the criminal proceedings, entitling the defendant to a new trial without a specific showing of prejudice because the error makes "the adversary process itself presumptively unreliable." *See also Van v. Jones*, 475 F.3d 292, 311-12 (6th Cir.) (holding that a defendant is deprived of counsel at a critical stage, "a *per se* Sixth Amendment violation [results,] warranting reversal of a conviction, a sentence, or both, as applicable, without analysis for prejudice or harmless error"), *cert. denied*, --- U.S. ----, 128 S.Ct. 708, 169 L.Ed.2d 557 (2007); *Roe v. Flores-Ortega*, 528 U.S. 470, 483, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

"The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942); *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); see also, *Cuyler v. Sullivan*, 446 U.S. 335, 349-50, 100 S.Ct.

1708, 1718-1719, 64 L.Ed.2d 333 (1980); *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); *Herring v. New York*, 422 U.S. 853, 863, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975).

In contrast, the Fifth Circuit opinion notes that:

> Godinez asserts that the sentencing proceeding was impermissibly continued without him or his counsel being present. The issue is raised for the first time on appeal; review is for plain error.[2] Godinez, however, has not established reversible plain error because he has not alleged, much less demonstrated, any prejudice. Thus, he cannot show that his substantial rights have been affected.
> (Opinion, p. 3)

After sentencing Godinez, the trial court excused Godinez from the courtroom and the hearing adjourned. (5-15-09, p. 16-17) The following discussion then took place between the trial court, the government, and the writer of the presentence investigation report:

P. O. Barrientos: I hate to interrupt, but we may have a calculation that we need to redo on the last sentence. So, I don't know if it's possible to catch Ms. Gonzales before she leaves.

The Court: Did he not grade out to 360 to

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[2] These issues were raised for the first time on appeal since Godinez nor his counsel were present when the error occurred/there was no opportunity to object. When there is no opportunity to object, this same court of appeals has held that the plain error standard inapplicable and instead, has applied an abuse of discretion standard *United States v. Warden*, 291 F.3d 363, 365 n. 1 (5th Cir. 2002). It is argued, that due to the nature of the error, no harm need be shown.

life?

P.O. Barrientos: Well the situation is, I understood you were just going to take off the plus two for the importing of the meth. But at the very end I thought I caught you to say that you were not going to hold him to the entire load - -

The Court: To the meth.

P.O. Barrientos: Of meth, right. And so that may change the numbers.

The Court: Okay. There were seven keys of meth.

P.O. Barrientos: Six point forty-seven net of meth, and that, just the meth by itself, is 129,400 kilos of marijuana equivalent.

The Court: Right.

P.O. Barrientos: That takes it over the 30,000 that's needed for 38.

The Court: Right.

P.O. Barrientos: Of the other loads that were seized, it we're just going with the seized loads, there's four other loads, two were cocaine that total 41.84 kilos.

The Court: Right.

P.O Barrientos: Which translates into 7,949.6 marijuana equivalent.

The Court: Uh-huh.

P.O. Barrientos: But the marijuana is 40.2914 kilos.

The Court: Okay. Actual seized. **That was not my intention was to - - on the marijuana and the coke was not to hold him to just seized amounts, but also** - -

P.O. Barrientos: Okay.

The Court: - - the estimated amount based on the overwhelming evidence as I explained on the record, that's been corroborated by law enforcement's surveillance, wiretaps - -

Ms. Trevino: Well, there were no wiretaps in this particular case, Your Honor.

The Court: There was no wire on this? Surveillance - -

P.O. Barrientos: But the codefendants actually, one of the codefendants pled to 150 plus kilos.

The Court: Right. Substantial debriefing. **So I did relevant conduct even on the marijuana and the coke.**

P.O. Barrientos: And the cocaine.

The Court: **I just didn't want to hold him to the meth.**

P.O. Barrientos: I know.

The Court: **I wanted to make sure that even the estimated loads of marijuana and**

coke were above the 38, the Base Offense Level of 38, and they are.

P.O. Barrientos: Removing the unseized - -

The Court: Removing the meth gave him the benefit of two points off.

P.O. Barrientos: Correct. Okay.

The Court: Right. Okay. So I don't want to make any changes. We were a little concerned maybe we made a mistake, Ms. Gonzales. so - - but we didn't. I sentenced him to what I intended to. Okay. Thank you. Sorry to - -

Ms. Gonzales: Thank you, Your Honor.

(5-15-09, p. 11-12) (Emphasis added)

Previously, the trial court found that Godinez was not in the business of "meth", did not hold him responsible for the "meth", and stated, "that's going to back two points out." (5-15-09, p. 10) The PSI report notes that 7.22 kilograms of methamphetamine was seized on 10/23/03. (Revised PSI, 1-30-09, p. 8) It also notes that 42.412 kilograms of marijuana and 41.84 kilograms of cocaine were seized for a combined equivalency of (42.412 + 8368) 8410.412 kilograms of marijuana. U.S.S.G. § 2D1.1, Drug Equivalency Table. This yields a base offense level of 34. U.S.S.G. § 2D1.1, Drug Quantity Table. To reach a base offense level of 38, relevant conduct has to be considered.

Previously, when the issue arose of the use of unseized drugs for punishment, this discussion took place:

Ms. Gonzalez: I don't know if - - our objections talked about, mostly - - which was **the biggest**

concern that my client had, that it talked about **unseized drugs**, and that was the **biggest concern** he has as far as, you know, this being included in the report. I don't know if it makes a big difference in the levels, but I just wanted to state for the record because I promised my client that I would, **that that was the biggest problem that we had with this, is that they're including additions of amounts of drugs that were from unseized - -**

The Court: I understand, but there's - -

Ms. Gonzalez: - - loads.

The Court: - - a lot of corroborating evidence from multi people involved in this conspiracy, as well as law enforcement that allowed loads to be moved as they were watching this transportation cell to corroborate that it was in excess of - - is it the 5,000 kilos of marijuana equivalent bringing him to the Level 38? Let me just look at that real quick. And we even seized loads - - let's see, 41 keys of coke were seized. That may push him to the highest level anyway. No, that doesn't push him to the highest level.

Ms. Trevino: Your Honor, even if we just stay with the seized loads, it's still at Level 38 if it's 30,000 kilos or more of marijuana.

The Court: Okay. That's what I had initially thought. And that's even taking out the meth, though?

Ms. Trevino: Uh-huh. Because this is a 38 and the meth is an S.O.C. The importation of the meth, that's an S.O.C., so that's -- we're not even there yet. So he's at a BOL of a 38 without the unseized loads.

The Court: That's what I understood as well.

(5-15-09, p. 11-12) (Emphasis added)]

At that point, the discussion over the unseized drugs ended before Godinez and his counsel and the trial court continued with a base offense level of 38. (5-15-09, p. 11-12) The issue of unseized drugs/relevant conduct was not fully litigated.

After pronouncing a sentence and releasing the parties, it then became apparent that there was an error in calculating the base offense level. The probation officer noted the error.

The trial court and the probation officer then discussed the error with the trial court noting that it had been his "intention" to include relevant conduct/unseized loads based on law enforcement's corroboration through wiretaps; was corrected that there were no wiretaps on this case; then stated that based on "substantial debriefing" had "did relevant conduct"; and that "I wanted to make sure that even the estimated loads of marijuana and coke were above the 38, the Base Offense Level of 38, and they are". (5-15-09, p. 11-12)

The base offense level was miscalculated. The seized drugs, for which Godinez was held responsible, yields a base offense level of 34. Ultimately, the trial court found a total offense level of 41 and a criminal history category of 3 with a guideline range of 360 to life. (5-15-09, p. 11-12) The trial court then sentenced Godinez to 360 months. (5-15-09, p. 11-12) Had the base offense level of 34, instead of 38, been used, Godinez would have had a total offense level

of (41-4) 37 with a guideline range of 262-327 months.

In the present case, harm is inherent from the absence of counsel since counsel could have engaged the court as to his reasoning and could have raised proper objections. The context of the trial courts statements could have been fully explored. The issue of relevant conduct could have been fully litigated. Without the presence of counsel. the adversary process, here, sentencing, is itself presumptively unreliable.

The error also affected substantial rights, and seriously affects the fairness, integrity, or public reputation of judicial proceedings since Godinez was without counsel at a critical stage in the proceedings in violation of Due Process and the Sixth Amendment to the United States Constitution. U.S. Const. Amends VI, XIV. Harm is inherent.

QUESTION PRESENTED FOR REVIEW

Does a defendant need to be present at sentencing?

REASONS FOR GRANTING THE WRIT

II. This case presents the rare situation where a United States court of appeals has sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power in that the Fifth Circuit Court of Appeals requires a defendant to object to proceedings he is unaware of and a showing of harm from his absence during sentencing.

Under Federal Rule of Criminal Procedure 43, the Supreme Court and Congress intended to impose a mandatory requirement of presence at sentencing to serve certain policies and interests, which requirement may not be waived. Fed. R.Crim.P. 43(a); *U.S. v. Turner*, 532 F.Supp. 913. 916 (D.C.Cal. 1982); *United States v. Brown*,

571 F.2d 980, 986 (6th Cir. 1978) (Rule 43 affords greater protections than are required by the Constitution)

In *United States v. Turner*, the court of appeals summarized the policy considerations of requiring the defendant's presence at sentencing in the following quote:

> Presence is of instrumental value to the defendant for the exercise of other rights, such as to present mitigating evidence and challenge aggravating evidence, and it may also be advantageous to him that the decision maker be required to face him. The state may have an interest in the presence of the defendant in order that the example of personal admonition might deter others from similar crimes. Moreover, it may sometimes be important that the convicted man be called to account publicly for what he has done, not to be made an instrument of the general deterrent, but to acknowledge symbolically his personal responsibility for his acts and to receive personally the official expression of society's condemnation of his conduct. The ceremonial rendering of judgment may also contribute to the individual deterrent force of the sentence is the latter is accompanied by appropriate judicial comment on the defendant's crime.
>
> However, there is an additional and perhaps more fundamental justification for the right to be personally present. Respect for the dignity of the individual is at the base of the right of a man to be personally present when society authoritatively proceeds to decide and announce whether it will deprive him of life or how and to what extent it will deprive him of liberty. It shows a lack of fundamental respect for the dignity of a man to sentence him in

> absentia. The presence of the defendant indicates that society has sufficient confidence in the justness of its judgment to announce it in public to the convicted man himself. Presence thus enhances the legitimacy and acceptability of both sentence and conviction.
>
> *Id.* at 915-916.

A defendant also has a constitutional right to be present at sentencing. *United States v. Vega*, 332 F.3d 849, 852 (5th Cir. 2003); *United States v. Martinez*, 250 F.3d 941, 941 (5th Cir. 2001) (*citing* Fed.R.Crim.P. 43(a) ("The defendant shall be present at ... the imposition of sentence....")); Fed. R.Crim.P. 43(a).

Th[is] constitutional right ... is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, but ... is [also] protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him". *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); U.S. Const. Amends. V, VI, XIV.

Failure by a criminal defendant to invoke his right to be present under Federal Rule of Criminal Procedure 43 at a conference which he knows is taking place constitutes a valid waiver of the right. *Id.* at 529.

The Fifth Circuit opinion notes that:

> Godinez asserts that the sentencing proceeding was impermissibly continued without him or his counsel being present. The issue is raised for the first time on appeal; review is for plain error. Godinez, however, has not established reversible plain error because he has not alleged, much less demonstrated, any prejudice. Thus, he cannot show that his substantial rights have been affected.

(Opinion, p. 3)

In contrast, the same court of appeals has written:

> This issue is being raised for the first time on appeal, for the simple reason that Bigelow had no opportunity at sentencing to consider, comment on, or object to the special conditions later included in the written judgment. Accordingly instead of reviewing for plain error, we "review the . . . court's imposition of [those] conditions for an abuse of discretion.

U.S. Bigelow, 462 F.3d 378, 381 (5th Cir. 2006)

Godinez did not know that issues surrounding his sentence were being discussed out of his and his attorney's presence. He did not waive his appearance. He did not voluntarily absent himself from those discussions. He was not present to object.

As noted earlier, in order to reach a base offense level of 38, relevant conduct would have to have been considered. However, this issue was not fully litigated in Godinez' presence. This was the issue that most concerned Godinez. (5-15-09, pp. 11-12) Regardless of what can be surmised from the trial court's comments, Godinez could have addressed the court as to the context of his statements, reasoning, and bases for his conclusions. Meaningful sentencing could have been had. Exacerbating this issue, Godinez was unable to assist counsel in his defense since counsel was not present.

Godinez was denied his statutory and constitutional rights to be present at sentencing. Like the presence of counsel, Godinez would argue that a defendants' presence at sentencing, when withheld at no fault of the defendant, is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

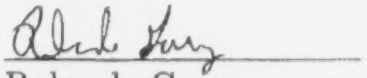
CONCLUSION

Godinez was denied his right to be present at

sentencing. Godinez was also denied the right to have counsel present at sentencing. Under the circumstances, harm in inherent/the adversary process itself is presumptively unreliable. Godinez prays Writ of Certiorari be granted.

Date:
August 9, 2010

Respectfully submitted.



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APPENDIX A

Case: 09-40567 Document: 00511018390 Page: 1 Date Filed: 02/02/2010

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-40567
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ALEJANDRO GODINEZ, also known as Juan Roberto Talavera, Jr.
Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:07-CR-776-1

Before REAVLEY, JOLLY and OWEN, Circuit Judges.

PER CURIAM:

Alejandro Godinez appeals his guilty plea convection for conspiracy to possess with intent to distribute more than five kilograms of cocaine, 1,000 kilograms of marijuana, and more than 500 grams of methamphetamine and conspiracy to commit money laundering promotion. Godinez was sentenced to a total of 360 months in prison.

In his first ground of error, Godinez complains that the district court erroneously calculated his base offense level because the court, contrary to its statements at sentencing, included within its drug quantity calculation 6.47 kilograms of methamphetamine. He argues that his

base offense level should have been 34 and level 38. In his fourth ground of error, Godinez complains of the assessment of relevant conduct to his offense score.

We review a sentence for an abuse of discretion. *Gall v. United States, 552, U.S. 38, 51 (2007).* In determining whether the district court abused its discretion, we must determine whether the district court committed any significant procedural error. Id. A district court commits a procedural error if it miscalculates or fails to calculate the proper guidelines range; if it imposes a sentence based on clearly erroneous facts; or if it fails to explain adequately its chosen sentence. *Id.*

A defendant convicted of a drug offense is sentenced based on the amount of drugs involved in the offense, with quantities of drugs from multiple transactions added together. *United States v. Culverhouse,* 507 F. 3d 888, 895 (5th Cir. 2007). A district court's determination of the amount of drugs for which a defendant should be held responsible is a factual finding which we review for clear error. *United states v. Posada-Rios* 158 F.3d 832, 878 (5th Cir. 1998.

Godinez takes the district court's statements at sentencing out of context. The statements were made in discussing the Government's recommendation that the two level enhancement of U.S.S.G § 2D1.1 should not apply and were not made in relation to the propriety of the drug quantity calculation. The drug quantity, as calculated in the presentence report (PSR), included the 6.47 kilograms of methamphetamine seized on October 23, 2003, a fact Godinez admitted at his plea hearing and in his written statement of acceptance of responsibility. There was no clear error. *See Posada-Rios,* 158 F3d. At 878. Responsibility. There was no clear error. *See Posada-Rios,* 158 F. 3d at 878.

With regard to the issue of "relevant conduct," Godinez asserts that the court erroneously considered

unseized loads of marijuana for purposes of the drug quantity calculation. The record refutes this claim. There is no indication

in the record that the district court considered the unseized loads in calculating the drug quantity.

In grounds of error two and three, Godinez asserts that the sentencing proceeding was impermissibly continued without him or his counsel being present. The issue is raised for the first time on appeal; review is for plain error. *See United States v. Mares*, 402 F3d 511, 520 (5th Cir. 2005). Godinez however, has not established reversible plain error because he has not alleged, much less demonstrated, any prejudice. Thus he cannot show that his substantial rights have been affected. *See id.* at 520-21.

In his final ground of error, Godinez faults the district court's assessment of the four-level upward adjustment under §3B1.1(a) for his leadership role in the offense. He argues that he was, at most, a mid-level supervisor or manner, warranting a three-level increase. The information in the PSR, which Godinez did no rebut, showed that he recruited and directed five or more participants in the transportation of the drug and drug proceeds. *See United States v. Davis* 76 F.3d 82,84(5th Cir. 1996); § 3B1.1, comment. (N.4). Thus, the district court did not clearly err in applying the adjustment. *See United States v. Rose*, 449 F.3d 627, 633 (5th Cir. 2006). The judgment of the district court is affirmed

AFFIRMED.

APPENDIX B

Case: 09-40567 Document:00511040741 Page:1
DateFiled:03/03/2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-40567

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ALEJANDRO GODINEZ, also known as Juan Roberto Talavera, Jr.,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas, McAllen

Before REAVLEY, JOLLY and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is Denied.

ENTERED FOR THE COURT

/S/ REAVLEY
United States Circuit Judge

APPENDIX C

United States District Court
Southern District of Texas
Holding Session in McAllen

United States of America **JUDGMENT IN A CRIMINAL CASE**

V.

ALEJANDRO GODINEZ
a/k/a Juan Roberto Talavera, Jr.

Case Number: 7:07-cr-00776-001
USM Number: 81845-179

☐ See Additional Aliases.

Michele Nicole Gonzales
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) 1 and 4 on February 1, 2008.

☐pleaded nolo contendre to count(s) _____
Which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21U.S.C.§846. 841(a)(1), and 841(b)(1)(A)	Conspiracy to possess, with intent to distribute, 1044.84 kilograms of cocaine and 949.612 kilograms of marijuana	12/15/2003	1

☐ See Additional Counts of Conviction

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ the defendant has been found not guilty on count(s)_____

☐ Count(s) 2,3,5 and 6 as to this defendant ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 15, 2009
Date of Imposition of Judgment

/S/ Randy Crane
Signature of Judge

RANDY CRANE
UNITED STATES DISTRICT JUDGE
Name and Title of Judge
June 12, 2009
Date

DEFENDANT: ALEJANDRO GODINEZ
CASE NUMBER: 7:07CR000776-001

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1956(A)(1)(A)(i) and (b)	Conspiracy to conduct a financial transaction involving the proceeds of a specified unlawful activity, with the intent to promote the carrying on of specified unlawful activity, knowing that the property involved represented the proceeds of some form of unlawful activity.	12/15/2003	

DEFENDANT: ALEJANDRO GODINEZ
CASE NUMBER: 7:07CR000776-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 360 months as to Count 1 and 240 months as to Count 4, said imprisonment terms to run concurrently with each other.

☐ See Additional Imprisonment Terms.

☐ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed in an institution where he can receive drug abuse treatment and/or counseling.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ by_____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at

the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation of Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____.

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By: _____
Deputy United States Marshal

DEFENDANT: ALEJANDRO GODINEZ
CASE NUMBER: 7:07CR000776-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 5 years as to Count 1 and 3 years as to Count 4, said Supervised Release terms to run concurrently with each other.

☐ See Additional Supervised Release Terms.

The defendant must report to the probation office in the district to which the defendant is release within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled

substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. (*For offenses committed on or after September 13, 1994)*

☐ the above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

☐ the defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ the defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check if applicable)

☐ the defendant shall register with the state sex offender registration agency in the state where the defendant resides, works or is a student, as directed by the probation officer (check if applicable.)

☐ the defendant shall participate in an approved program for domestic violence. (Check if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adapted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☐ See Special Conditions of Supervision

1) the defendant shall not leave the judicial district without the permission f the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the

probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change is residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested of questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or special agent of law enforcement agency without the permission f the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

If deported, the defendant is not to re-enter the United States illegally. If the defendant is deported during the period of probation or the supervised release term, supervision by the probation officer becomes inactive. If the defendant returns, the defendant shall report to the nearest U.S. Probation Office immediately. Supervision by the probation officer reactivates automatically upon the defendant's reporting

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DEFENDANT: ALEJANDRO GODINEZ
CASE NUMBER: 7:07CR000776-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

Assessment	**Fine**	**Restitution**
TOTALS $200		

☐- See Additional Terms for Criminal Monetary Penalties.

☐ the determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ the defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall

receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of payee	Total Loss *	Restitution
☐ See Additional Restitution Payees.		
TOTALS	$0.00	$0.00

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than 2500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C § 361(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but not before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A Lump sum payment of $200 due immediately, balance due
☐ no later than ____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E or ☐ F below); or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal____ installments of $_____ over a period of _____, to commence ____ days after the date of this judgment; or

D Payment in equal ____ installments of $____ over a period of ___ , to commence _____ days after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within___ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Make all payments payable to U.S. District Clerk, Attn: Finance, P.O. Box 5059, McAllen, Texas 78502.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
Case Number
Defendant and Co-Defendant Names
☐ see additional defendants and co-defendants held joint and several.
☐ The defendant shall pay the cost of prosecution.
☐ the defendant shall pay the following court cost(s):
☐ the Defendant shall forfeit the defendant's interest in the following property to the United States:
☐ See additional forfeited property.
Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and 98) costs, including cost of prosecution and court costs